Supreme Court, U.S.
FILED
JUN 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-2014

RAYMOND W. ANDERSON and PAUL W. KEVE,
Petitioners,

v.

THOMAS H. WINSETT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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v.

THOMAS H. WINSETT,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners respectfully request that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Third Circuit in the above-captioned cause.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit is not yet reported. It is set out in the Appendix hereto at pages A-3 to A-42. The opinion of the United States District Court for the District of Delaware is reported at 443 F. Supp. 1369. It is set out in the Appendix at pages A-44 to A-54.

JURISDICTION.

The opinion and order of the United States Court of Appeals for the Third Circuit were filed on March 24, 1980. This Court's jurisdiction is invoked pursuant to 28 *U. S. C.* § 1254.

QUESTION PRESENTED.

Do state statutes specifying humane treatment of prisoners with an eye toward their rehabilitation create a liberty or property interest which requires federal judicial review of classification decisions?

STATEMENT.

This case involves a due process challenge by Respondent (the "prisoner") to the denial of his application to participate in a discretionary work release program.[1] Specifically at issue is the Court of Appeals' determination that a liberty interest existed in this case even though prison officials were vested with discretion in admitting inmates to the program.

The prisoner is a Delaware inmate serving a life sentence for the 1963 murder of a Delaware state policeman. He claims that he was denied due process because the denial of his three applications for work release was motivated by prison officials' fear of possible retaliation by

1. This case first arose in the District of Delaware. Jurisdiction was conferred upon the District Court by 28 *U. S. C.* §§ 1331, 1343(3).

In addition to his due process claim, the prisoner also raised an equal protection claim which was not based upon any allegation of class-based discrimination. The District Court denied the claim. Because of its resolution of this case, the majority of the Court of Appeals did not reach this issue.

the Delaware General Assembly (most likely in the form of budget, personnel and program cutbacks) and of adverse public reaction.

Delaware's work release program permits participating prisoners to hold jobs in the outside community. Inmates frequently live in a low security residence maintained by the Delaware Department of Correction. Inmates residing in this facility are subjected to comparatively few restrictions and are usually free to leave the residence during daylight hours.[2]

The prisoner made his first application for work release in 1974. Although the prisoner met certain criteria for eligibility, petitioner Anderson, the warden, exercised his statutory veto power and denied the prisoner's application "due to the sensitivity of his offense."

In 1976 the prisoner filed a second application. At the time this application was filed petitioner Keve, who was Acting Commissioner of the Delaware Department of Correction, was making efforts to arrange for the prisoner's transfer to the Minnesota prison system. These efforts were being made at the request of the prisoner.

The District Court found that both the 1974 and 1976 denials were motivated "at least in substantial part" by the prison officials' fear of retaliation by the Delaware General Assembly. However, it found that the Commissioner deferred a decision on the second application because he felt that the potential transfer to Minnesota would ultimately be of more benefit to the prisoner.

The prisoner's third application was denied in 1977. By the time of the third denial, petitioners no longer occupied their official positions. The District Court found that the third denial was not motivated by any concern

2. On occasion the Delaware Department of Correction has also operated a smaller work release program out of one of its secure facilities.

for possible retaliation by the General Assembly. This finding was uncontested on appeal.

The District Court, adhering to this Court's teachings in *Meachum v. Fano,* 427 U. S. 215 (1976), denied the prisoner's due process claim. It found that the Delaware statute authorizing the work release program did not bestow on this prisoner a right to participate in that program. Likewise, it held that the Department's regulations did not give the prisoner a right to participate in the program. Since the prisoner had no cognizable entitlement to participate in the program, the trial court concluded that the prisoner had no liberty or property interest at stake.

The history of the prisoner's appeal is somewhat unusual. The appeal was argued before a three judge panel of the Third Circuit in December, 1978. In the Spring of 1979, without having issued an opinion, the Court of Appeals *sua sponte* directed that the matter be reargued before the court *en banc.* The matter was reargued in November, 1979, and the divided court issued its opinion on March 24, 1980.

The Court of Appeals reversed the District Court's holding that the prisoner had no protectible liberty or property interest. The prisoner conceded that the statute authorizing the work release program did not create such an interest, and the Court of Appeals recognized that the pertinent regulations vested prison officials with discretion in approving or rejecting applications. The Court of Appeals instead focused on another statute specifying in broad terms that prisoners be treated "humanely, with effort directed to their rehabilitation . . . ." *Del. C. Ann.* tit. 11, § 6531 (A55). The court concluded that this statute limited the discretion of the prison officials. Without finding any specific regulatory or statutory entitlement, it found that the statutory directive to treat prisoners

humanely creates a liberty interest because the prison officials' exercise of discretion must be consistent "with the purpose and policy behind work release." (Slip Op. 21, A23). According to the Court

> "We hold that a state-created liberty interest in work release arises when a prisoner meets all eligibility requirements under the state statutes and the exercise of the prison authorities' discretion is consistent with work release policy."

(*Id.*, A23-24)

REASONS FOR GRANTING THE WRIT.

I.

The Decisions of the Court of Appeals Conflicts With Decisions of This Court.

In any due process analysis, the first step must be a determination whether there has been a deprivation of life, liberty or property. *Board of Regents v. Roth*, 408 U. S. 564 (1972) (procedural due process); *Kelly v. Johnson*, 425 U. S. 238 (1976) (substantive due process). In this case the Court of Appeals concluded that the prisoner was deprived of a liberty interest in connection with the denial of his application for work release despite the fact that acceptance into that program is discretionary with prison officials. This determination conflicts with previous decisions of this Court.

The prisoner's valid criminal conviction and sentence extinguished his right to freedom from confinement. *Vitek v. Jones*, — U. S. — , 63 L. Ed. 2d 552 (1980). Thus he must find any liberty interest in work release in state statutes or prison regulations. The prior opinions of this Court demonstrate that he must show a clear entitlement to participate in work release in order to establish such an interest. *Compare Goss v. Lopez*, 419 U. S. 565, 573 (1975) ("legitimate claims of *entitlement* to a public education" sufficient); *Wolff v. McDonnell*, 418 U. S. 539, 557 (1974) ("statutory *right* to good-time" sufficient); *Perry v. Sindermann*, 408 U. S. 593, 601 (1973) (understanding equivalent to tenure created a sufficient "claim of *entitlement*"); *with Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U. S. 1, 60 L. Ed. 2d 668 (1979) (possibility of parole insufficient); *Meachum v. Fano*, 427 U. S. 215 (1976)

(expectation of remaining in same prison insufficient); *Board of Regents v. Roth*, 408 U. S. 564 (1972) (expectation of non-tenured teacher to be rehired insufficient).[3] As this Court has at least twice stated:

> "[T]o obtain a protectible right
>
> > 'a person clearly must have more than an abstract need for it. He must have more than a unilateral expectation of it. He must instead, have a *legitimate claim of entitlement to it.*'"

Greenholtz, supra, 60 L. Ed. 2d at 675, *quoting Board of Regents v. Roth*, 408 U. S. 564, 577 (1972) (emphasis added in petition). No opinion of this Court holds that a mere expectancy, premised upon the anticipated favorable exercise of discretion by a decision maker, constitutes a protectible liberty interest.

Contrary to this principle, the Third Circuit made no finding that a specific statute or regulation conferred on the prisoner an entitlement to participate in the work release program. Indeed, the prisoner conceded that the statute authorizing the work release program did not confer upon him a right to participate in the program (Slip Op. at 17, A19) and the Court of Appeals acknowledged that the Department of Correction regulations conferred discretion upon the prison officials in selecting inmates to participate in the program (Slip Op. at 18, A20-21). The absence of any finding of a specific entitlement is underscored by the Court of Appeals' apparent rejection of the requirement of such a finding:

> The trial court's reasoning, *which apparently would limt protectible interests solely to those which can be described as vested rights,* effectively ar-

3. Emphasis in the parenthetical explanations added.

> rogates to the States the power to devise both the interests protectible by due process and the process which is due.

(Slip Op. at 20, A23) (emphasis added).

Without finding any specific entitlement, the Court of Appeals in an unwarranted quantum leap held the Due Process clause requires that the admitted discretion of the prison officials be exercised in a manner consistent with what that court perceived as the statutory policy underlying the work release program. In effect the Court of Appeals has put the cart before the horse, for it has reached the substantive due process issue (the exercise of discretion consistent with the "policy" of the program) in order to create the requisite entitlement. It is respectfully urged that dissenting Circuit Judge Weis correctly appraised the majority's holding when he wrote:

> "[C]arving out a due process right to work release because of its otherwise illusory character confuses what process is due with the question whether a protectible interest exists."

(Slip. Op. at 38, A41).

II.

The Reasoning and Result Reached by the Court of Appeals Far Transcend the Bounds of This Particular Case.

The holding of the Court of Appeals has the effect of subjecting any discretionary decision by prison administrators to judicial review via the Due Process clause. Although the Third Circuit's ruling was based in part upon its interpretation of a state statute, its effect extends

beyond Delaware because of the prevalence of statutes of similar import.[4]

The statute from which the Court of Appeals inferred a policy for work release is broad in scope. It is not limited to work release but rather applies to all "[p]ersons committed to the care of the Department [of Correction]." *Del. C. Ann.* tit. 11, § 6531. Since the statute applies to all phases of prisoner life, there is no reason to believe that even the most routine discretionary decisions by prison officials are now subject to judicial review under the Due Process clause. The scope of such decisions now reviewable is limitless. If the reasoning of the Third Circuit is allowed to stand, the Due Process clause will force prison administrators to prove daily in court that routine matters such as internal transfers and security restrictions are consistent with the policy of " 'humane' treatment, 'rehabilitation,' and 'return to the community as safely and promptly as practicable.' " (Slip Op. at 19, A22).

In short, the Court of Appeals' analysis places the federal courts astride the day-to-day decisions of prison administrators. This Court has repeatedly stated that federal courts do not sit to supervise prison administrators. *Bell v. Wolfish*, — U. S. —, 60 L. Ed. 2d 447 (1979); *Meachum v. Fano*, 427 U. S. 215, 228-9 (1976); *Preiser v. Rodriguez*, 411 U. S. 475, 491-2 (1973); *accord Wood v. Strickland*, 420 U. S. 308, 326 (1975) ("§ 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of . . . discretion [by administrators] which do not rise to the level of violation of specific constitutional guarantees."). Yet this is precisely the result which is obtained from the Court of Appeals' reasoning.

4. *See, e.g.*, N.J. Rev. Stat. tit. 30 § 1B-3 (Cum. Supp. 1979); N.Y. Correction Law § 45 (McKinney Cum. Supp. 1979); Pa. Stat. Ann. tit. 61, § 460.3 (Cum. Supp. 1979).

If that reasoning is not refuted, the widespread existence of statutes such as Delaware's will transform federal courts into arenas wherein prisoners can air even their most trivial grievances.

Further, the holding of the Court of Appeals will operate as a deterrent to programs requiring prison officials to predict inmate behavior. These predictions are often made on the basis of subjective evaluations which can not always be articulated in traditional findings. *Greenholtz, supra,* 60 L. Ed. 2d at 676. But prison officials will henceforth be reluctant to deny prisoner applications unless they are able to articulate reasons which are consistent with some statutory policy. In such cases the prison administrator is faced with a Hobson's choice: either approve the application against his instincts or face a suit for damages. The ultimate result will be the curtailment of programs dependent upon successful prediction of inmate behavior or the elimination of statutes advocating humane treatment and rehabilitation of prisoners.[5]

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5. An additional burden faces prison administrators. In light of the now widespread liberty interest, the specter of constant due process hearings in connection with formerly administrative decisions now confronts them.

CONCLUSION.

For the foregoing reasons, this Court should issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1344

THOMAS H. WINSETT,

Appellant

v.

F. EARL McGINNES, Secretary of the Department of Health and Social Services; PAUL V. KEVE, Director of Adult Corrections; RAYMOND W. ANDERSON, Superintendent of Delaware Correctional Center; DONALD R. DAVIS, Deputy Superintendent of the Delaware Correctional Center; MILTON HORTON, Acting Chief of Adult Corrections; JAMES T. VAUGHN, Commissioner of Department of Corrections; WALTER W. REDMAN, Superintendent of Delaware Correctional Center

(D. C. Civil No. 74-210)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: SEITZ, *Chief Judge* and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

JUDGMENT ON REHEARING.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel on December 11, 1978 and reargued en banc on November 8, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 31, 1978, be, and the same is hereby reversed insofar as it dismisses Winsett's action for damages against Superintendent Anderson and Commissioner Keve, affirmed insofar as it dismissed Winsett's damages claim against Commissioner Vaughn, Superintendent Redman, and Assistant Bureau Chief Horton, and in the denial of injunctive relief on the ground of mootness; and the cause is remanded to the said District Court for further proceedings consistent with the opinion of this Court. Each side to bear its own costs.

ATTEST:

THOMAS F. QUINN
Clerk

March 24, 1980

Certified as a true copy and issued in lieu of a formal mandate on April 15, 1980.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1344

THOMAS H. WINSETT,

Appellant

v.

F. EARL MCGINNES, Secretary of the Department of Health and Social Services; PAUL W. KEVE, Director of the Delaware Division of Adult Corrections; RAYMOND W. ANDERSON, Superintendent of Delaware Correctional Center; DONALD R. DAVIS, Deputy Superintendent of the Delaware Correctional Center; MILTON HORTON, Acting Chief of Adult Corrections; JAMES T. VAUGHN, Commissioner of Department of Corrections; WALTER W. REDMAN, Superintendent of Delaware Correctional Center

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
(D.C. Civ. No. 74-210)

Argued December 11, 1978
Before: GIBBONS, VAN DUSEN, ROSENN, *Circuit Judges*
Argued Before Court In Banc November 8, 1979
Before: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges*
(Opinion filed March 24, 1980)

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OPINION OF THE COURT.

ROSENN, *Circuit Judge*

This appeal requires us to determine whether certain Delaware prison officials violated an inmate's constitutional rights when, because of their fear of adverse public reaction and legislative reprisals against the prison system, they denied his applications for work release.

Following the denial of his work release applications, the inmate, Thomas H. Winsett, brought a civil rights action in the United States District Court for the District of Delaware under 42 U. S. C. § 1983 (1976) and the fourteenth amendment to the federal constitution. In this action, Winsett sought compensatory and punitive damages as well as injunctive and declaratory relief. The prayer for injunctive relief, *inter alia,* sought to restrain the prison officials from considering possible public reaction and possible reprisal by the Delaware General Assembly when evaluating his future applications for admission to the program. Following a lengthy trial, the district court rejected Winsett's claims and entered judgment in favor of the defendants. This appeal followed.

We conclude that the request for injunctive relief is moot; that Winsett's prayer for damages is permissible as to two of the defendants, subject to certain findings to be made by the district court concerning official immunity and the measure of plaintiff's injury; and that his request for declaratory relief, insofar as it is a predicate to damages, should be granted if the trial court finds that damages may be awarded. Accordingly, the district court judgment will be vacated in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion.

I.

Winsett was convicted in 1964 and sentenced to life imprisonment for the felony murder of Robert Paris, a Delaware State Police Officer. The killing aroused a pervasive public outrage throughout the state.[1] As certain prison officials would later put it, "Winsett [was] singled out for more public and political attention than other inmates we know of [,] even those whose crimes were more serious. . . ."

Winsett was duly confined in the Delaware Correctional Center to begin his sentence. During the next ten years leading up to the initiation of this litigation, Winsett was a model prisoner. He pursued courses in heating and air conditioning, did maintenance work for the prison, wrote weekly articles about prison life in a prison newspaper, and got along well with other inmates and officers. On September 16, 1974, believing himself to be sufficiently rehabilitated to adjust to life outside the prison, Winsett requested classification to work release status. 425 F. Supp. at 610. Work release is a program by which prisoners are permitted to maintain employment in the community

1. *See* Winsett v. McGinnes, 443 F. Supp. 1369, 1369-70 (D. Del. 1978); Winsett v. McGinnes, 425 F. Supp. 609, 610 (D. Del. 1976).

while still under correctional supervision. Releasees return to a correctional institution or a residential center after the completion of each workday. The work release program in Delaware is governed by 11 Del. C. § 6533(a). That section, at the time of Winsett's initial application, provided:

> (a) The Department may adopt rules and regulations governing the employment or education of trustworthy inmates outside the institution . . . except that whenever the Department requests placement of inmates in a school of a reorganized school district, the approval of the board of education of that district shall be a prerequisite to such placement . . .[2]

Pursuant to this statutory authority, the Delaware Department of Corrections adopted a set of rules, also applicable at the time of Winsett's September, 1974 application for work release.[3] Together, the statute and the

2. This section was somewhat revised by an Act of August 5, 1976, 60 Del. Laws, c. 705, *codified in* 11 Del. C. §§ 6533(a), 6533A. The changes do not affect the disposition of this case.

3. The rules in effect at that time were entitled "Criteria and Procedure for Statewide Work Education Release." They provided:

I. *Basic Criteria, All Institutions:*

1. Written one year of release or parole eligibility date.

2. Demonstrated interest in personal improvement; progress toward increased maturity and self understanding. This will be evaluated on basis of inmate's work habits, program participation and general adjustment.

II. *Basic Procedures:*

1. Written application is submitted by inmate, following which it is considered by and must be approved successively by:

a. Classification team

b. Work/education release staff

c. Superintendent

rules established a vital rehabilitative system, one which the Delaware Division of Adult Corrections has acknowledged as among "the final steps in . . . provid[ing] treatment and training of inmates with an end result of their being able to take their place in society as law-abiding citizens upon their release."

Approval for work release requires the concurrence of three levels of decisionmakers. A prisoner must first apply to an appropriate "classification team." In Winsett's case, this first level review was carried out by the Minimum Security Building Classification Team. That

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3. (Cont'd.)

III. *Variations:*

1. Delaware Correctional Center

a. Applicant must be assigned to Minimum Building before he can apply.

b. Application is made to the Minimum Classification team first, then to the Institutional Classification Team.

2. Sussex Correctional Institution
Classification Committee makes final decision.

3. Women's Correctional Institution
No variation from basic.

IV. *Specific Criteria for Admission to Plummer Center:*

1. Six months to parole eligibility or release.

2. Sufficient experience in the work/education release program at the institution to have demonstrated a stable, dependable work and adjustment record.

3. Family or personal history associated with Wilmington area.

4. A score of at least 34 points on the scoring tool used by Plummer Center.

5. Approval by the Director, the Superintendent of the institution, and the State Work Release Supervisor in the case of any inmate with a sex crime or crime of violence.

NOTE: Exceptions can be made to all of the above procedures. Exceptions must be approved by the Superintendent and Supervisor for Work/Education Release. If there is a conflict between these two, it is to be resolved by a committee of the Superintendent. State Supervisor for Work/Education Release, and Assistant Director for Community Services.

team approved his application for work release. Its recommendation was then forwarded to the so-called Institution Classification Committee which also approved Winsett's application. 433 F. Supp. at 1370; 425 F. Supp. at 610.

As Winsett's application was working its way up to Superintendent Raymond W. Anderson for his final approval, public opposition to granting work release to Winsett became increasingly evident. One manifestation of this growing opposition was an August 7, 1974 letter addressed to Delaware Correctional Center Superintendent Anderson and written by Delaware State Senator Cicione. The letter strongly condemned what the Senator believed to be Anderson's intention to prepare Winsett for work release. "As a State Senator," the author declared, "I demand that you reconsider and retract the actions already taken and take immediate steps to return Winsett to the ranks of regular prison restrictions."

The letter elicited an equally strong response from Superintendent Anderson. On August 8, 1974, more than a month before Winsett applied for work release, defendant Anderson wrote the Senator, informing him that "as long as I am Superintendent of the institution, I shall never be able to entertain any requests from Tom [Winsett] in regards to Work Release. . . ." The Senator "greatly appreciated" this response and "commend[ed Anderson] for [his] stand on not allowing Mr. Winsett to participate in the work-release program." On September 26, 1974, Superintendent Anderson rejected Winsett's application for work release.

Thereupon, on October 15, 1974, Winsett initiated this action. He alleged that the defendants' decision was predicated on the "sensitivity" of his offense, and charged that such a factor is "a legally impermissible" basis for

evaluating work release applications. Winsett proceeded against F. Earl McGinnes, Secretary of the Delaware Department of Health and Social Services, Paul W. Keve, Director of the Delaware Division of Adult Corrections and later Acting Commissioner of the Delaware Department of Corrections, Raymond W. Anderson, Superintendent of the Correctional Center, and Donald Davis, Deputy Superintendent of the Delaware Correctional Center.[4]

While this action was pending in the trial court, Winsett applied a second and third time for work release. His second application, filed in early March of 1976, was approved by both the Minimum Security Building Classification Team and the Institution Classification Committee. However, Milton Horton, then Assistant Director of the Adult Division, recommended that Winsett's "application be deferred until [a] decision on [the] transfer" was made.[5] Paul Keve, who was Acting Commissioner of the Department of Corrections at the time, agreed and the application was deferred, but was formally recorded as a denial.

Winsett filed his third and final application for work release in November, 1976. Again he was approved by the Minimum Security Building Classification Team and the Institution Classification Committee. A third committee, newly created by the General Assembly and entitled the Institutional Release Classification Board, also

4. Defendants' motion for a directed verdict as to F. Earl McGinnes and Donald R. Davis was granted at the close of the plaintiff's case. 443 F. Supp. at 1369 n. 1. Winsett has not appealed that disposition.

5. *See* 443 F. Supp. at 1370. The "transfer" referred to by Horton was a project, ultimately unsuccessful, that Keve had been developing for several months. Essentially, Keve had hoped to work out a contract with the Corrections Department of the State of Minnesota under which the interstate transfer of certain inmates could be accomplished. It was felt that this project would be especially suitable for Winsett.

approved Winsett's application. The application was vetoed, however, by Milton Horton, now Assistant Bureau Chief of Adult Correction. Horton advanced three reasons for his veto decision: (1) the seriousness of the offense; (2) the lack of a certified parole release date. which he believed was required by the existing guidelines; and (3) Winsett's previous history of model conduct during incarceration in other institutions for offenses committed prior to the Paris murder, and that his good conduct during his present incarceration should therefore be given less weight. This veto was approved by then Commissioner James T. Vaughn.

Following the denials of Winsett's second and third applications for work release, additional defendants Milton Horton, James Vaughn, and Superintendent Walter W. Redman were joined in the action.[6] On December 30, 1976, the district court, in a preliminary jurisdictional ruling, held that plaintiff's request for injunctive relief, insofar as it sought his immediate admission to work release, would be denied. 425 F. Supp. at 613. The court based its ruling on the Supreme Court's decision in *Preiser v. Rodriguez*, 411 U. S. 475 (1973), which held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus[,]" with

6. There is no record of any motion by Winsett to join these defendants, and the testimony at trial indicates that they participated only in their official capacities. We will assume that these defendants were joined as subsequent prison officials as to whom injunctive or declaratory relief, barring similar decisions in the future, might be applicable. Because of our disposition of Winsett's plea for equitable relief, however, *see infra* at 11-12 and note 11, our consideration of these defendants as formal parties has no effect on their or anyone else's liability.

the attendant requirement of exhaustion of state remedies. 411 U. S. at 500. Winsett has not appealed from that decision. The court also held that Winsett's claims for damages, and for declaratory relief as a predicate to damages, could be entertained on the merits. 425 F. Supp. at 612-13. Implicitly, the court further held that, insofar as Winsett's plea for injunctive relief was intended *not* to secure his immediate release but simply to prevent the future application of impermissible standards in evaluating his work release requests, that injunctive action could be heard in a federal forum.

Winsett's case went to trial on July 21, 1977. At the outset, his lawyer made clear that the primary objection was to the allegedly impermissible standards used in rejecting Winsett's applications for work release. Superintendent Anderson acknowledged the correspondence with Senator Cicione, and admitted that the Senator's Chairmanship of the Joint Finance Committee was a matter of particular concern to the administration of the corrections system. He also acknowledged that he had been aware of the possibility that Paul Keve might not be confirmed by the Senate, given its displeasure with the prison system. Anderson was also examined with respect to his answers to certain interrogatories which seemed to indicate that his rejection of Winsett's initial application was influenced primarily by public pressure in general and the complaints of "[t]he State Police and certain Senators" in particular.

Appellee Keve's testimony was even more revealing. The Legislature, Keve noted, had given the corrections department certain privileges pertaining to programs such as work release and furloughs and had amply demonstrated to him "its readiness very quickly to withdraw such privileges . . . whenever there was disappointment

on their part with the way that the Department exercised these." Keve saw his role as one of protecting the "inmate population as a whole" where their privileges might be jeopardized by actions taken in a particular case. Although he did not think that his rejection of Winsett's second application was influenced by the Legislature's possible refusal to confirm him as Commissioner, he admitted that he was conscious of this hazard. However, he satisfied himself that he adhered to decisions which he conscientiously regarded "as right and best for the Department rather than those decisions which simply would protect my job."

Keve acknowledged that if he had taken steps toward granting Winsett work release, relations between the prison system and the legislative leadership would have suffered.[7] Indeed, he noted, the rejection of Winsett's second application had nothing at all to do with the existing eligibility criteria. Rather, it was the result of "intense legislative pressure." Had it not been for this pressure, Keve admitted, Winsett would have gone on work release. Although this pressure apparently was not formal legislative action, it was very difficult for him to

7. With respect to tensions in the summer of 1976 between the Department and legislative leadership, Keve testified:

> Q. No. I am saying that were you to take steps which would have been positive with respect to Tom Winsett's work release, that it would have endangered or at least made more difficult your relationships with the powers in the General Assembly?
>
> A. Yes, it would have. We were already having various kinds of problems with the Legislature being very critical of the Department's operation, I would say from, oh, very early spring in 1976 right on through the summer. There were efforts in the Senate while it was still in session up to the end of June to make demands upon the Governor for my discharge, for instance, and frequent calls for changes; and, as I said, at the same time there were bills being pushed through the Legislature to circumscribe our privilege of extending outside status to inmates.

take "any kind of decisive action in that particular job without incurring some displeasure of somebody and very, very frequently legislators." He knew he could expect some "praise from one kind of legislator and intensive criticism from another kind." He therefore had to weigh Winsett's best interests and the effect of his release on the overall program and other inmates.[8] The trial court rendered its decision on January 31, 1978. It found that the denials of Winsett's first and second applications for classification to work release "were motivated at least in substantial part by prison officials' concern about a possible retaliation by the Delaware General Assembly." 443 F. Supp. at 1371. In the case of the second denial, the court was convinced that "Acting Commissioner Keve believed that he had an alternative approach to work release which would better serve Winsett's interests." *Id.* The court further found that the rejection of Winsett's third application "was not motivated by [a] concern with possible retaliation by the General Assembly or by a concern for public reaction." *Id.*

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8. Later in the examination of Commissioner Keve, the court attempted to elicit from the witness precisely how great a factor in his consideration of Winsett's second application was the Legislature's intervention. Keve commented:

> There is another factor, and in one sense you can say it is a different factor and in another it is inseparable. . . . This one I mentioned, the fact that if Mr. Winsett had been put into work release, my assessment of his chances of parole, assuming he is still in Delaware, were such that I would have to assume that he would be in a work release much longer than what we would consider an optimum safe period of time for a person to be in work release, and that certainly was a factor that would reasonably give us much pause. But you see, it is still related to the same basic background condition because you ask, why was he probably not going to get parole very soon, and it goes right back to the same things, the public and legislative attitudes which the Parole Board also realistically had to give much weight to.

Although it found the first two rejections to have been largely the product of prison officials' concern of possible legislative retaliation, the trial court nevertheless held that neither Winsett's due process nor equal protection rights had been violated. To invoke a due process claim, the court noted, a party must first establish that he had a protectible interest. Surveying the work release statute and the regulations promulgated thereunder, the court rejected Winsett's contention that they created a vested law right to which due process should attach.

The trial court also rejected Winsett's equal protection claim. It held that his failure to allege or prove any class-based discrimination precluded recovery under the Equal Protection Clause. Accordingly, although it acknowledged the rather striking irregularities in the first two refusals of his work release applications, the trial court denied all of Winsett's requests for relief.

Winsett appealed. On May 17, 1977, while the appeal was pending, Winsett was granted parole with the condition that he be transferred to a correctional institution in another state and serve four years in that institution prior to his release to parole supervision. On November 16, 1978, Winsett was transferred to Kilby Correctional Facility near Montgomery, Alabama. As we explain in more detail below, this transfer measurably changes the scope of available relief.

II.

We note at the outset that whatever may be the defendants' substantive liability, Winsett's demands for injunctive relief is now moot. The only injunction sought by Winsett in this appeal is one to restrain the defendants from continuing to rely on allegedly impermissible criteria in evaluating his future applications for work release.

Because Winsett has now received a conditional parole, is no longer subject to Delaware's jurisdiction, and shows no interest in returning,[9] his injunctive request no longer implicates "an actual controversy . . . at [this] stage . . . of review. . . ." *Steffel v. Thompson,* 415 U. S. 452, 459 n. 10 (1974).[10] There is no evidence on the record suggesting that Winsett is *currently* harmed in any respect by whatever legislative animosity influenced past evaluations of his work release petitions. *Cf. Super Tire Engineering Co. v. McCorkle,* 416 U. S. 115 (1974) (even though injunction was dissolved with the end of a strike, employers still retained sufficient interests and injury to warrant declaration that state welfare benefits plan for strikers was invalid); *Carroll v. President & Commissioners of Princess Anne,* 393 U. S. 175, 178 (1968) (court decision continues to affect official response to rally). Nor do we have any reason to suppose that there may be *future* occasions on which Winsett will again confront similar treatment. *Cf. Southern Pacific Terminal Co. v. I.C.C.,* 219 U. S. 498, 515 (1911) (short term orders of ICC are capable of repetition, yet evading review). Furthermore, Winsett did not file his complaint as a class action, in which the need for injunctive relief often survives the mootness of the class representative's interest. *See, e.g., Sosna v. Iowa,* 419 U. S. 393 (1975).

Winsett's transfer to Alabama vitiates any need to enjoin the application of allegedly impermissible criteria in his case, and because none of the exceptions to the traditional mootness doctrine is present, we will vacate the district court's disposition of plaintiff's injunctive claim and

9. Indeed, Winsett indicated to the examining psychiatrist that he planned to return to Alabama once he was paroled because his parents and siblings are located there.

10. *See* Note, *The Mootness Doctrine in the Supreme Court,* 88 Harv. L. Rev. 373, 374-77 (1974).

remand with a direction to dismiss.[11] *United States v. Munsingwear, Inc.*, 340 U. S. 36, 39 (1950).

III.

Although Winsett's claim for injunctive relief is now mooted, his claims for damages, and for declaratory relief as a predicate to damages, are not. Although he has not demonstrated that the threatened application of impermissible criteria poses any likelihood of ongoing or prospective harm, it is conceivable that past applications may give rise to damages. For example, prison officials acknowledged at trial that work release may favorably affect an inmate's chances for an early parole. In addition, work release is a source of wages for the working inmate. Where such claims remain, the foreclosure of injunctive relief does not moot a party's entire clause of action.[12] We therefore turn to Winsett's substantive attack on the allegedly impermissible criteria applied in his applications for work release.

A. *Due Process*

Winsett argues in this court, as he did in the district court, that the Delaware Department of Correction, by establishing a work release program and by promulgating standards for its administration, created a protectible

11. Because Winsett's suit for injunctive relief must be vacated, there can be no liability assessed against defendants Horton, Vaughn and Redman. *See* note 6 *supra*.

To the extent that Winsett's claim for declaratory relief is also addressed to the future application of impermissible criteria, the disposition of that claim will also be vacated with similar instructions. Insofar as the declaratory prayer is simply a predicate to a damage award, it survives this dismissal. *Cf. Wolff v. McDonnell*, 418 U. S. 539, 554-55 (1974) (declaratory judgment as a predicate to a damage award survives dismissal of injunctive claim where latter is held to be available only through a separate habeas corpus proceeding).

12. *See* Note, *supra* note 10, 88 Harv. L. Rev. at 373.

state law interest in participation in the program by eligible inmates. He contends that the use of impermissible criteria by the Department in denying him access to the work release program denied him his right to "liberty" guaranteed by the fourteenth amendment.

Winsett's due process claim has both procedural and substantive overtones. It is procedural in the sense that the alleged use of impermissible criteria by the Department denied Winsett of the process of work release application review required under the Delaware regulations. His due process claim is substantive in the sense that regardless of any procedural rights, the application of impermissible criteria deprived him, as contrasted with other eligible inmates, of access to the work release program. Regardless of whether Winsett's due process claim is substantive, procedural, or an amalgam of both, he must have a protectible liberty or property interest in order to invoke the protection of the fourteenth amendment. We therefore first consider whether any protectible fourteenth amendment interest is implicated in the Delaware work release program.

It is well-settled that when a person is lawfully incarcerated for the conviction of a crime, that person's constitutional rights become circumscribed. *Price v. Johnston,* 334 U. S. 266, 285 (1948). The Supreme Court has been careful to indicate, however, that although a prisoner's rights "may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisoners of this country." *Wolff v. McDonnell,* 418 U. S. 539, 555-56 (1974).

Inasmuch as a prisoner's liberty is most directly implicated by his imprisonment, the Supreme Court has

struggled to define the extent of a prisoner's fourteenth amendment liberty interest. The Court has been generally reluctant to find a constitutionally protected liberty interest while a prisoner is still under actual confinement.[13] In *Meachum v. Fano*, 427 U. S. 215 (1976), the Court held that no protectible liberty interest was implicated when prison authorities sought to transfer a prisoner from one facility to another. Most recently, in *Inmates of the Nebraska Penal Correctional Complex v. Greenholtz*, 442 U. S. 1, 99 S. Ct. 2100 (1979), the Court held that no liberty interest was implicated by the mere existence of a state parole system. Although the Court had held in *Morrisey v. Brewer*, 408 U. S. 471 (1972) that a liberty interest was implicated in parole revocation procedures, the Court in *Greenholtz* drew a crucial distinction between parole revocation which deprives one of the liberty one has and discretionary parole release which denies a conditional liberty that one desires. 442 U. S. at 9-10. Thus, there is no constitutionally mandated right to enter a discretionary parole release program.

Even if the Constitution is not the source of a prisoner's potential liberty interest in various aspects of his confinement, the Supreme Court has been willing to extend fourteenth amendment protection when a state has itself created a liberty interest in the form of a specific guarantee. In *Wolff, supra*, the Nebraska legislature had provided for a "good-time credit" system under which a prisoner's sentence could be reduced for good behavior. Under this system, good-time credits could only be forfeited through "serious misconduct." The Court held that because the state created the right to good-time

13. The Court has been willing to find a liberty interest once a prisoner has regained his freedom even though that freedom is subject to revocation and circumscribed by conditions of parole. *See* Morrisey v. Brewer, 408 U. S. 471 (1972) (liberty interest in parole revocation).

credits which could only be removed if the prisoner engaged in serious misconduct, "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." 418 U. S. at 557. Indeed, the Court's non-recognition in *Meachum* of a constitutional liberty interest in prison transfers must be viewed in light of the absence of any state-created right to remain in the prison of original commitment. *See* 427 U. S. at 226-27.

But the Court in *Greenholtz* acknowledged that although there was no constitutionally cognizable liberty interest in access to a discretionary parole system, "the expectancy of release provided for in [the Nebraska parole] statute" may be entitled to some measure of constitutional protection. 442 U. S. at 12. The Court cautioned, however, that the existence of a statutorily created liberty interest depends upon the statutory language and "must be decided on a case by case basis." *Id.*

From this review of Supreme Court precedent, it becomes evident that Winsett's claim of a liberty interest in participation in the Delaware work release program must be grounded either in the Constitution or in the statutorily-set schema for work release in Delaware. Winsett does not press for a constitutionally-based liberty interest in work release. He also concedes that the language of 11 Del. C. § 6533 does not create a protected interest entitling him to participate in the work release program. The fundament of his claim is the set of regulations promulgated by the Department to implement the basic legislative grant of authority to create a work release program. It is this set of comprehensive regulations which Winsett claims creates the liberty interest subject to fourteenth amendment protection.

Initially, we do not believe that Winsett's concession that the statute itself does not create the state-created right is fatal to his case, for we believe the right may be established in the regulations implementing the statute. In *Durso v. Rowe,* 579 F. 2d 1365 (7th Cir. 1978), *cert. denied,* 439 U. S. 1121 (1979), the Seventh Circuit, although declining to find a liberty interest in a work release statute, nevertheless held that if the prisoner could establish as a matter of practice that his work release program would not be revoked absent a rule violation, he had an interest protected by due process. *Id.* at 1371. Therefore, under *Durso,* the Due Process Clause may be triggered in a work release program not only by statutorily created rights but also by official policies or practices. This is precisely the basis of Winsett's argument. We must therefore turn to the regulations governing work release in Delaware to ascertain if they have created a protectible liberty interest.

The district court in the instant case declined to find a state-created liberty interest because, even though Winsett met all the criteria for eligibility, it believed that the work release statute and regulations did not deprive the program of its "essentially discretionary character." 443 F. Supp. at 1373. Although it acknowledged Winsett did meet all the criteria for work release but was denied work release status by the exercise of the prison officials' discretion, the court concluded Winsett never had any state-created entitlement to work release. We disagree.

The work release statute and the regulations envision the grant of work release when a prisoner meets certain eligibility criteria and the prison authorities, exercising their sound discretion, concur that work release is appropriate. The presence of discretion on the part of the prison authorities in the work release program does not negate the possibility that a state-created entitlement to

work release may exist, because we do not view the prison authorities' discretion as absolute. If the prison authorities could by the arbitrary exercise of discretion deny a work release application to a prisoner even though he met all eligibility requirements, then any entitlement to work release would be illusory rather than real. The trial court apparently perceived the discretion vested in the Delaware prison authorities as unbridled, rendering any claim of entitlement to work release an illusion. We are not persuaded, however, that the Superintendent's discretion under the state regulations in granting work release is as boundless as the trial court believed.

The authority of the Department of Corrections to adopt regulations governing work release stems from the work release statute, 11 Del. C. § 6533(a). Although the trial court may be correct that the regulations adopted do not exhaust the criteria pertinent to a decision whether or not to grant work release, it is by no means clear that the Superintendent may, under the rules, invoke any criterion he chooses. First, the state has established an elaborate institutional system for processing work release applications, a system that at various times has included at least two and sometimes three separate committees whose recommendations were forwarded to the Superintendent. We cannot believe that those committees, whose function apparently involved making rather detailed evaluations of inmates' fitness for work release, were intended to be overridden for any reason chosen by the Superintendent, however unrelated to the statutory purpose of section 6533.

More critically, 11 Del. C. § 6533(a), under which the regulations were promulgated, is itself subordinate to section 6531, which sets forth the programs—including work—which the Commissioner must establish and

the purposes those programs must serve. That section provides, in pertinent part:

> Persons committed to the institutional care of the Department shall be dealt with humanely, with effort directed to their rehabilitation, to effect their return to the community as safely and promptly as practicable. The Commissioner shall establish the following programs, and may establish others: Education, including vocational training; work; case work counselling and psychotherapy; library and religious services; commissary; and shall institute procedures for the study of classification of inmates for these purposes.

The regulations promulgated under section 6533(a) must thus satisfy the broad dictates of section 6531: "humane" treatment, "rehabilitation," and "return to the community as safely and promptly as practicable." Thus, these are benchmarks which delineate the perimeters of the Superintendent's exercise of discretion, unlike *Meachum v. Fano, supra,* where the discretion to transfer under state law was absolute. Here, the "regulations imposed on the Superintendent indicate that discretion may be exercised only within established parameters." *Tracy v. Salomack,* 572 F. 2d 393 (2d Cir. 1978).

The trial court correctly noted that some other relevant considerations—among which it included the prognosis for the inmate's behavioral adjustment, the risk of flight, and the inmate's personal safety—are not specified in the regulations. But those were *not* the considerations which the trial court found to have motivated the prison officials in evaluating Winsett's first two applications. Had they been, they could certainly have been justified as consistent with the policies of section 6531. Instead,

the underlying reason for the adverse decisions on Winsett's applications was a lurking fear that an approval would possibly invoke unfavorable public reaction and legislative reprisal. This fear was sparked by communication from one or more of the legislators. Although these reasons may have significance in the broad administration of a prison system, no place has been provided for their consideration in the exercise of discretion whether to grant or deny a prisoner work release under the regulatory provisions.

The trial court's reasoning, which apparently would limit protectible interests solely to those which can be described as vested rights, effectively arrogates to the States the power to devise both the *interests* protectible by due process and the *process* which is due. Thus, in the trial court's view, whenever a State conditions an otherwise protectible interest on the outcome of a highly discretionary process, however arbitrary and inadequate in practice, the interest is defeasible and not entitled to due process safeguards. Such a construction of the relevant law is unacceptable. *Meachum v. Fano, supra,* does not entail such a construction. There, after all, the Court noted that there was no state statutory predicate whatsoever for the right to remain in one prison until certain specified events occurred. Thus, however vital to an inmate's interests was the desire to remain in one prison, there was no state-sponsored expectation interest which due process would protect.

In Delaware, there are specific criteria for work release which we believe if met, give rise to a liberty interest in work release. Although discretion is vested in the prison authorities to grant or deny work release, that discretion must be exercised consistently with the purpose and policy behind work release. We hold that a state-

created liberty interest in work release arises when a prisoner meets all eligibility requirements under the state regulations and the exercise of the prison authorities' discretion is consistent with work release policy. We conclude that Winsett had a protectible liberty interest in work release because he met all eligibility criteria under the Delaware regulations and the considerations influencing the discretionary denial of work release, namely concern for public reaction and fear of legislative reprisals, were outside the legitimate bounds of the prison officials' discretionary power. In other words, had they acted within the permissible scope of their discretion, Winsett would have been granted work release. To hold otherwise, would mean that the state-created interest in work release for eligible prisoners could be overriden simply by the prison officials' abuse of discretion. We therefore conclude that Winsett had a liberty interest protectible under the fourteenth amendment's guarantee of due process.

Having concluded that Winsett has a protectible state-created interest in work release, we must now consider whether its denial could have violated the fourteenth amendment's guarantee of due process. Winsett's argument is primarily substantive in nature. The consideration of impermissible criteria, fear of public outcry and legislative reprisal, brought different treatment to Winsett than any other applicant to the work release program. We, however, perceive Winsett's argument as more properly implicating procedural due process rights. If the prison officials considered the extraneous criteria of public opinion and legislative reaction, the normal procedure for considering work release applications was distorted to Winsett's detriment. Under the work release program, the applicant is entitled to have his application approved if all eligibility criteria are met and the prison authorities approve the application. If the authorities do not properly exercise their

discretion, the process due under the work release program is denied.

We believe that Winsett has made out a case of deprivation of his procedural due process rights in the denial of his first two work release applications. The district court found, as we have previously noted, that Winsett's first and second applications for work release were rejected, at least, in substantial part by prison officials because of a fear of legislative reprisals against the prison system as a whole. The State of Delaware does not contend that these findings were clearly erroneous. We can only conclude that in considering the extraneous criteria, Superintendent Anderson and Commissioner Keve violated the procedure to be accorded Winsett's work release application, and that Winsett has a cause of action against them for the alleged deprivation of procedural due process.[14]

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14. The dissent would allow public opinion to enter into the administrative decisionmaking process as a permissible and even significant element in granting or denying work release by prison officials. Dissenting opinion typescript at pp. 9-12. Under the dissent's thesis, prison officials could legitimately consider in the exercise of their discretion what they perceive may be public reaction, regardless of its lack of bearing on the prisoner's qualifications for participation in work release under the established state standards. Such form of decisionmaking could be dangerous to and destructive of procedural due process. Public opinion against a prisoner could be orchestrated on notes and chords as discordant as race, creed, ethnic background, labor activities, political views, or other factors having no pertinence to a prisoner's rehabilitative progress and fitness to participate in a work release program.

We do not deny that society has a legitimate interest in insuring the punishment of crime, especially serious felonies. But society also recognizes that more often than not there is a terminal point to retribution and that it should, as Delaware has done, concern itself with the rehabilitation and return of the prisoner to a productive role in the community. When a state undertakes to provide a work release program for the rehabilitation of its prisoners, some degree of imprecision in determining the eligibility of the candidates may be tolerated. But when discrepant treatment

B. *Equal Protection*

The trial court rejected plaintiff's equal protection attack on the criteria applied to his work release requests. It did so on the ground that Winsett did not allege a class-based discrimination. Because we have found those criteria impermissible on due process grounds, we express no views on Winsett's equal protection contentions.

IV. *Official Immunity*

Because the district court found that no constitutional rights were violated, it did not have occasion to reach the issue of the applicability of the good faith immunity defense to Commissioner Keve and Superintendent Anderson. The defendants contend that even if this court finds that Winsett's constitutional rights were violated, we may not assess damages against Commissioner Keve. Relying on the Supreme Court's decisions in *Wood v. Strickland,* 420 U. S. 308 (1975), and *Procunier v. Navarette,* 434 U. S. 555 (1978), defendants argue that Commissioner Keve enjoys an official immunity from recoveries in damages. They also observe that should we find Superintendent Anderson liable, we must remand to the district court for findings as to Anderson's possible immunity. Because the district court made no findings as to either Keve or Anderson's immunity, we believe it necessary to remand the case to the district court.

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14. (Cont'd.)
between prisoners is purposeful and participation in work release is denied to one prisoner only because of the Superintendent's amorphous perception of public opinion, then the laudable purposes of a structured program are skewed by a basic lack of fairness. If work release for a prisoner is not determined solely on the basis of the statutory and regulatory criteria established by the state but may also depend upon what may be perceived public reaction to it, these extraneous considerations can cut both ways. Not only can worthy work release applications be thereby denied but similar influences may compel admittance to the program of undesirable and unqualified applicants.

In *Wood v. Strickland, supra,* the Supreme Court recognized a qualified immunity for school board members. The Court held that

> a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.

420 U. S. at 322. More recently, in *Procunier v. Navarette, supra,* the Court applied *Wood* to an inmate's § 1983 damage action against prison officials. It also made clear that *Wood* established two separate grounds for rejecting official immunity in a particular case. First, the Court stated:

> [T]he immunity defense would be unavailing to petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right and if they knew or should have known that their conduct violated the constitutional norm.

434 U. S. at 562.

On remand, the district court should consider whether, even though we have found the denial of work release by defendants Anderson and Keve to be constitutionally infirm, they are entitled to the benefit of good faith immunity for actions of officials when they are sued for damages pursuant to section 1983. In that connection, it clearly will be relevant for the court to con-

sider whether the interest which they violated was "clearly established at the time of their challenged conduct," and whether there were any other factors which could have given them reason to know that their conduct was constitutionally defective.

The second branch of the *Wood* decision authorizes liability when the official has acted with "malicious intention" to deprive the plaintiff of a constitutional right or to cause him "other injury." *Procunier, supra,* 434 U. S. at 566. "This part of the rule," the Court has observed, "speaks of 'intentional injury,' contemplating that the author intends the consequences of his conduct." *Id.* The court will also need to consider whether its finding that "Commissioner Keve believed that he had an alternative approach to work release which would better serve Winsett's interests," 443 F. Supp. at 1371, should shield him from liability under the second branch of the Wood formulation of good faith immunity. The record amply corroborates Keve's efforts to obtain for Winsett a transfer to the Corrections Department in Minnesota, a transfer which he expressly believed would result in an earlier, and safer, parole. Although Winsett may well have been injured through a loss of earnings and a denial of early parole, the record may preclude a finding on remand that Commissioner Keve acted maliciously toward Winsett.

We agree with the defendants that the case must be remanded to the trial court for findings as to possible malice on the part of Superintendent Anderson. Winsett does not challenge this suggestion. We believe that there is ample evidence in the record from which the district court may make the requisite findings with respect to the applicability of the good faith immunity defense and that there is no requirement to adduce any ad-

ditional testimony. Accordingly, we will remand the case to the district court in order that it make the requisite findings as to Anderson's liability in damages under the malice test articulated in *Wood*.

V. *Proof of Actual Damages*

Because it believed that the defendants' rejection of Winsett's work release applications violated none of his constitutional rights, the trial court had no occasion to assess what damages Winsett may properly collect. On remand, the trial court, if it finds Anderson and Keve liable, shall ascertain the appropriate measure of damages.

VI. *Conclusion*

We are not unmindful that sixteen years ago, Winsett was found guilty of the wanton slaying of a Delaware State Police officer. The public outrage generated by that murder apparently has not yet subsided. However, the strength of our legal system is the recognition of the right of all American residents to have their individual cause—even though it be merely an interest in a rehabilitation process—considered on its merits. The right to due process is fundamental in our legal system and must, of necessity, preclude consideration of impermissible reasons. Due process may not be sacrificed because of public outrage and blinding passions of society. Public outrage may at times perform a useful function in our society, but it serves no purpose in fairly and objectively judging the merits of a person for access to a rehabilitation program.

Accordingly, the judgment of the district court will be reversed insofar as it dismisses Winsett's action for damages against Superintendent Anderson and Commissioner Keve, affirmed insofar as it dismissed Winsett's damage claim against Commissioner Vaughn, Superin-

tendent Redman, and Assistant Bureau Chief Horton, and in the denial of injunctive relief on the ground of mootness. The case will be remanded for further proceedings not inconsistent with this opinion.

Each side to bear its own costs.

WEIS, *Circuit Judge,* dissenting.

I would affirm the judgment of the district court. The case is now reduced to a damage suit against two individuals, Anderson and Keve, resting on two separate incidents, Anderson's rejection of Winsett's application for work release in 1974, and Keve's veto in 1976. Although the liability theory underlying each is the same, it is desirable to treat the claims against the defendants separately. I believe the record requires a conclusion that Keve is entitled to official immunity and that the plaintiff has not established a claim against Anderson.

A court should not decide a constitutional question if the record supports some other ground that would obviate the need to make such a determination. *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). In my view, it is consistent with this policy to decide a case, when possible, on the basis of immunity, and I therefore apply that rationale to Keve's case. As to Anderson and the 1974 incident, however, the findings of the district court are not sufficient to support a decision on immunity at this point. Thus, it is necessary to address the constitutional issue in his case. Although this prevents complete avoidance of the constitutional question, deciding Keve's immunity confines the liberty interest inquiry to Anderson's case.

I

I would not remand the case to the district court for specific findings on the immunity of defendant Keve. I agree that the guidelines discussed by the court, particularly the two-step analysis set out in *Procunier v. Navarette*, 434 U. S. 555 (1978), are the considerations that apply. In my view, however, the record is adequate to make the determination in this court. For example, in *Reese v. Nelson*, 598 F. 2d 822 (3d Cir. 1979), we analyzed the record in a case submitted to a jury and found that the evidence required a finding of immunity as a matter of law. Here, by contrast, the task of evaluating the immunity issue is less complex because we have the benefit of the district judge's findings and opinion.

The first step is to decide whether a clearly established constitutional right should have been apparent to Keve in 1976. That assumes, of course, that such a constitutional right exists, a premise I accept only arguendo. The majority opinion does not cite any cases handed down before 1976 even arguably close to the circumstances present here, nor has my research uncovered any such authority. No Supreme Court case to that date had discussed the subject of conditional release eligibility, nor were there any opinions of this court holding that such an interest was protectible. Accordingly, there is nothing to demonstrate that the interest that Keve arguably violated was "clearly established at the time of [the] challenged conduct." *Procunier v. Navarette, supra* at 562. Because he could not reasonably have been expected to be aware of a constitutional right that had not yet been judicially declared, Keve did not act in disregard of established law.

The second inquiry of the immunity analysis is subjective—whether the defendant acted with malicious

intent to cause a deprivation of constitutional rights or other injury to the plaintiff. Stated inversely, "The official himself must be acting sincerely and with a belief that he is doing right. . . ." *Wood v. Strickland*, 420 U. S. 308, 321 (1975).

The trial court credited Keve's testimony that because of the likely public and legislative reaction to the plaintiff's work release status. Winsett faced far more hazards than other inmates. Under these circumstances, it was more feasible to secure parole or work release after a transfer to another state, and Keve was negotiating such a transfer at the time he disapproved Winsett's application. The court said, "In the case of the second denial, I am convinced Acting Commissioner Keve believed that he had an alternative approach to work release which would better serve Winsett's interests." *Winsett v. McGinnes*, 443 F. Supp. 1369, 1371 (D. Del. 1978). This finding belies any inference of malice on the part of defendant Keve and satisfies the subjective test of sincerity and a "belief that he is doing right." Having met both phases of the immunity test. Keve is entitled to the judgment entered in his favor by the district court.

II

A

Since Anderson's conduct occurred two years before Keve's, it is even more apparent that the former meets the requirements under the first phase of the immunity inquiry. But I cannot complete the second step in the analysis because the district court did not make any findings on Anderson's subjective intent, and the record does not support appellate resolution of this question.

Anderson did testify that he declined to approve the work release application because he feared for Winsett's

safety. This apprehension was the result of at least one telephone call to the prison threatening harm to Winsett if he were put on work release. Anderson attributed the threats to public reaction fueled by press reports, letters to the editor, and the opposition of the state police. The defendant bore Winsett no animosity and said that some years earlier he had offered use of his home to Winsett as a place to visit his son on Christmas Day. Indeed, in 1976, Anderson appeared in Winsett's behalf before the Parole Board to urge an out-of-state parole. The defendant testified that his job was protected by the merit system and denied that he succumbed to pressure from the state senator in Winsett's case.

Although Anderson's testimony would support a finding that he acted in subjective good faith, I do not have the benefit of the trial judge's credibility determinations and, consequently, cannot pass upon the defendant's immunity at this point.[1] I therefore turn to the issue of the alleged constitutional violation.

B

I start with the assumption that a discretionary work release program and discretionary parole system basically require the same analysis to determine if there is a protectible interest that invokes due process standards. The majority's reference to *Greenholtz v. Inmates of the Nebraska Penal Correctional Complex*, 442 U. S. 1 (1979), leads me to believe that there is no disagreement between us on that score. We part company on whether the circumstances warrant finding that Winsett had a

1. Winsett was not the only person who was denied work release after public outcry. Norman Parson, who had been convicted of the attempted rape and brutal murder of a young girl, also alleged that because of intense public resentment he had been denied furloughs and work release. *See Parson v. Keve*, 413 F. Supp. 111 (D. Del. 1976).

state-created liberty interest in an expectancy of work release status. In my view, the majority's conclusion is contrary to the Court's holding in *Greenholtz.*

In that case the Supreme Court addressed the question, whether due process applies to discretionary parole-released determinations. Initially the opinion noted that decisions of the executive branch, especially with respect to the "sensitive choices" to grant parole, "however serious their impact, do not automatically invoke due process protection." 442 U. S. at 7. The "public-interest purposes of rehabilitation and deterrence" may prompt the state to be either general or specific in enumerating the factors that the parole authorities should consider. "It is thus not surprising that there is no prescribed or defined combination of facts which, if shown, would mandate release on parole. . . . In each case, the decision differs from the traditional mold of judicial decision making" in that the parole determination is a "predictive judgment as to what is best for the individual inmate and for the community." *Id.* at 8. In that connection, the Court found that in passing on parole the decisionmaker must consider whether, in light of the nature of the crime, the inmate's release would minimize the gravity of the offense, weaken deterrent impact on others, and "undermine respect for the administration of justice." *Id.*

Two theories were proffered in support of the claim to due process protection of a prisoner's expectancy of release on parole: first, that the word "liberty" in the due process clause included a prisoner's interest in the possibility of parole whenever a state establishes a parole system; second, that the particular statutory language involved in the case gave rise to a state-created liberty interest in release on parole. The Court rejected the former but accepted the latter. It found a liberty interest created by a state statute directing that the Parole Board

"shall order" a prisoner's release "unless" it found certain enumerated conditions to justify a denial.

The Court emphasized the essentially discretionary nature of parole but held that the "unique structure and language" of the statute under review created an expectancy of release that satisfied the claim to constitutional protection. As the majority recognizes, however, the Court stressed that "whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis." *Id.* at 12. Thus, discretion in the granting of parole is the general rule and generates no protectible interest. Only when discretion is restricted by statutory language that mandates the parole authorities to grant release does a liberty interest come into being. It is the statute's command, not discretion, that creates the interest.

This, however, is not the test adopted by the majority. Instead the formula used is "that a state-created liberty interest in work release arises when a prisoner meets all eligibility requirements under the state regulations and the exercise of the prison authorities' discretion is *consistent with work release policy.*" Majority Opinion at A23-24 (emphasis added). As I read it, *Greenholtz* does not recognize a protectible interest if the "discretion" is merely "consistent with" a state statute. The dissent in that case calls attention to the majority's use of the word "shall." 442 U. S. at 29 n. 9, and as the Court of Appeals for the Second Circuit remarked in *Boothe v. Hammock*, 605 F. 2d 661 (1979), "the 'shall/unless' formula was decisive for the court." *Id.* at 664. The Second Circuit found that in New York, while guidelines were "used to structure the exercise of discretion," the state system did not establish a scheme whereby parole "shall be ordered unless specified conditions are found to exist." *Id.* Accordingly, no protectible interest arose. Other courts of appeals and district courts addressing the identical issue

have adopted this interpretation of *Greenholtz*. *See, e.g., Wagner v. Gilligan*, 609 F. 2d 866 (6th Cir. 1979); *Shirley v. Chestnut*, 603 F. 2d 805 (10th Cir. 1979); *Robinson v. Mabry*, 476 F. Supp. 1022 (E. D. Ark. 1979); *Austin v. Armstrong*, 473 F. Supp. 1114 (D. Nev. 1979); *Campbell v. Montana Board of Pardons*, 470 F. Supp. 1301 (D. Mont. 1979).

In 1974 there was no mandatory language in the Delaware statute authorizing the promulgation of regulations. It merely stated that the department "may" establish such rules.[2] That is not enough. I would concede that rules using mandatory language would suffice, but I find no such wording here. The regulations merely list some general (not all-inclusive) standards. They speak in terms of "basic criteria" and "basic procedures." Nowhere is there language requiring that if these criteria are met the authorities "shall" grant work release status. Indeed, "basic procedures" state that approval must be given at three different levels. By no fair construction can this language be interpreted to mean that those approvals "shall" be given. *See Shirley v. Chestnut, supra* at 806-07.

I am convinced that the majority's "consistent with" test does not comply with the stringent requirements of *Greenholtz*, which I read as insisting upon "mandated by" or "directed by." Having failed to meet that standard, therefore, Winsett failed to establish a protectible interest. The only other way that a liberty interest could be created would be through the alternative theory of a prisoner's expectancy of conditional release expressly rejected

2. The statute was amended in 1976 to substitute the word "shall" for the word "may." 60 Del. Laws c. 705, § 1 (1976), *amending* DEL. CODE ANN. tit. 11, § 6533. Even if this amendment antedated Winsett's initial application for work release, however, my view of this case would remain unchanged. Under either version of the statute, the regulations actually adopted would have to be taken into account because the enabling statute does not delineate eligibility requirements.

in *Greenholtz* and by the majority here. That approach would build on *Morrissey v. Brewer*, 408 U. S. 471 (1972), and derive a liberty interest in the possibility of release from the Constitution itself.

The *Morrissey* Court held that a parolee's interest in not having his parole *revoked* is an interest protected by due process. Central to this holding was the parolee's reliance on at least an implicit promise that his freedom would be taken away only if he failed to live up to the parole conditions—the "essence of parole." *Id.* at 477, 482. For this reason the Court concluded that the termination of parole liberty inflicts a "grievous loss" on the parolee. The interest in continued release, therefore, rose to the level of "liberty" protected by the due process clause independent of the statutory or regulatory language establishing the parole system.

In *Greenholtz* the claimants argued that the interest at stake in both a parole-revocation decision and a parole determination is the same, and the two situations should be accorded the same constitutional protection. 442 U. S. at 9. In rejecting this argument the Court again emphasized the predominately discretionary nature of parole and stressed the crucial difference between the grant and revocation of parole—"being deprived of a liberty one has . . . and being denied a conditional liberty that one desires." *Id.* In addition, the Court noted that revocation of parole involved the comparatively simple task of resolving the factual question of whether a violation had occurred. The parole release decision by contrast may be made " 'for a variety of reasons and often involves no more than informed predictions' " as to what best would serve correctional purposes or the interest of the prisoners. *Id.* at 10, *quoting Meachum v. Fano*, 427 U. S. 215, 225 (1977).

The Court made it clear that the possibility of parole provides no more than a hope that it will be obtained.

"To that extent the general interest asserted here is no more substantial than the inmate's hope that he would not be transferred to another prison, a hope which is not protected by due process." *Id.* at 11. To support this last point, the Court cited *Meachum v. Fano, supra,* where it was held that a prisoner could be transferred at the discretion of prison officials, "for whatever reason or for no reason at all." 427 U. S. at 228.

The practical effect of the holding in the case at bench—given the lack of regulatory or statutory language limiting the discretion of the prison authorities—is to find an implied promise in any work release program that an application will be denied only for cause. This is precisely the line of analysis that was rejected by the *Greenholtz* Court when it distinguished *Morrissey,* and I do not agree that *Greenholtz* should be circumvented in this fashion.[3]

C

Even if contrary to my view, the "consistent with" standard can be squeezed into the *Greenholtz* mold, however, I do not accept the majority's narrow reading of "work release policy." The majority finds this policy not in the regulations or in the enabling statute, but in § 6531 of title 11 of the Delaware Code, which governs in general the treatment of "persons committed to the institutional care of the Department [of Correction]." The statute provides that such persons are to be treated humanely and guided toward rehabilitation. I gather that in assessing work release applications, the majority would

3. In meeting the plaintiff's equal protection claim, the district court observed that there was no proof of class-based discrimination but only an assertion of an individual misapplication of state law. The court, relying on *Beck v. Washington,* 369 U. S. 541 (1962), found the claim to be without merit. *Winsett v. McGinnes,* supra at 1373-74. Under the circumstances I do not find this conclusion to be erroneous and, in view of the majority's approach, see no need for elaboration.

approve such factors as risk of flight, the inmate's personal safety, and the prognosis for the inmate's behavioral adjustment. *See* Majority Opinion at A20-24. Although it understandably does not attempt to delineate definitively the outer perimeters of matters it believes to be within the officials' discretion, "concern for public reaction," at least, is outside the pale.

I cannot accept this restriction because nothing in the enabling statute suggests that the Department of Correction was not to have very wide discretion in implementing a work release program, and the regulations themselves do not impose any stringent guidelines. In recognizing such matters as "what is best for the community," weakening deterrent effect on others, and undermining respect for the administration of justice as appropriate considerations for parole release, *Greenholtz* cannot be reconciled with the majority's view that it is improper for prison officials to allow "concern for public reaction" to enter into the determination of whether to grant work release privileges.[4]

Moreover, reliance upon § 6531, without any consideration of the standards for parole enunciated in § 4347, is an illogical limitation on the prison officials' discretion. Analogizing to the standards governing the parole decision would be appropriate since the regulations on work release refer to eligibility for parole and, obviously, the requirements for the two are interrelated. As shown in footnote 8 of the majority opinion, eligibility for parole was one of the critical factors affecting the decision to

4. In late 1976, the Delaware legislature created the Institutional Release Classification Board to pass on all releases and consisting of seven members, three of whom were to be private citizens appointed by the Council on Administration of Justice. DEL. CODE ANN. tit. 11, § 6529A (Michie 1979). According to testimony, the three private citizens were to reflect public sentiment.

grant work release. According to the prison officials who testified at trial, the denial of parole after work release had been granted was a devastating experience for a prisoner, and, consequently, if early parole could not reasonably be anticipated, work release was contraindicated.

In Delaware, parole may be granted when there is a reasonable probability that the person can be released "without detriment to the community or himself. . . . A parole shall be ordered only in the best interest of society. . . ." DEL. CODE ANN. tit 11, § 4347 (Michie 1979). In the case of an offender convicted of first degree murder —as is true of Winsett—the immediate family of the victim may testify before the Parole Board. *Id.* § 4350(b). Others presenting "information or arguments to the Board" are to do so in writing. *Id.* § 4350(a). Thus, in Delaware, the decision to grant parole necessarily involves greater discretion than simply deciding whether "humane treatment and rehabilitation" are at stake. The Board may consider potential detriment to the community and the other factors listed in *Greenholtz,* including public opinion.[5]

If, as the majority holds, the improper exercise of discretion impinges upon a protectible interest, the bounds of legitimate discretion must be expanded to include consideration of the public interest in deterrence and respect for the administration of justice. Public opinion is not an impermissible factor.

The trial judge stated that the denial of Winsett's application was motivated, in substantial part, by "prison officials' concern about a possible retaliation by the Delaware General Assembly." *Winsett v. McGinnes, supra* at

5. In his letter to the state senator, Superintendent Anderson referred to the concern of Mrs. Paris, the widow of the state police officer whom Winsett shot and killed.

1371. Whether the court referred to personal or institutional repercussions is not apparent from the opinion. In his testimony, Keve said that over the years the legislature had given the Department of Correction the privilege of implementing work release and furlough programs. But the legislature also had demonstrated that it would quickly revoke that power if the program proved disappointing. As Keve explained, he "had to be concerned with the inmate population as a whole and not exclusively with the advantage that should be given to any one case." He faced the possibility that anything done for Winsett that would smack of extra privilege "might cause legislative reaction that would cut back the privileges for all other inmates, and this was a distinct, you know, kind of jeopardy. . . ."

The point at which "legislative oversight" exceeds its proper limits and unduly infringes upon exeuctive or agency action as well as individual interest is not always clearly marked. The majority feels that the boundary was crossed in this case and faults the two corrections officials for not stoutly resisting what is viewed as an invasion. Because they and not the invaders are defendants, it is the corrections officials who will be exposed to a damage assessment should their immunity defense fail in the trial court.

I cannot help but wonder if the court has reached this stage because it, too, has wandered outside its sphere by groping to find a protectible interest where none exists. Arbitrariness is anathema to the judicial mind. But carving out a due process right to work release because of its otherwise illusory character confuses what process is due with the question whether a protectible interest exists. *Wolff v. McDonnell*, 418 U. S. 539, 556-58 (1974). I fear the court has disregarded *Greenholtz's* caution that

"there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error free determination." 442 U. S. at 7. In a similar vein, *Meachum* warned against "subject[ing] to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." 427 U. S. at 225.

I would affirm the judgment of the district court.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 74-210

THOMAS H. WINSETT,

Plaintiff,

v.

F. EARL McGINNES, Secretary of the Department of Health and Social Service; PAUL W. KEVE, Director of the Delaware Division of Adult Corrections; RAYMOND W. ANDERSON, Superintendent of Delaware Correctional Center; DONALD R. DAVIS, Deputy Superintendent of the Delaware Correctional Center,

Defendants.

ORDER.

THIS 31st day of January, 1978, for the reasons stated in the Court's Opinion of this date,

Now, therefore, IT IS ORDERED that judgment is entered in favor of the defendants and against plaintiff.

WALTER K. STAPLETON
United States District Judge

UNITED STATES DISTRICT COURT,
D. DELAWARE.

Jan. 31, 1978.

Civ. A. No. 74-210.

THOMAS H. WINSETT,

Plaintiff,

v.

F. Earl McGINNES, Secretary of the Department of Health and Social Services; Paul W. Keve, Director of the Delaware Division of Adult Corrections; Raymond W. Anderson, Superintendent of Delaware Correctional Center; Donald R. Davis, Deputy Superintendent of the Delaware Correctional Center,

Defendants.

Arlen B. Mekler, Wilmington, Del., for plaintiff.

John A. Parkins, Jr., Asst. Atty. Gen., Dept. of Justice, Wilmington, Del., for defendants.

OPINION.

STAPLETON, *District Judge:*

This 42 U. S. C. § 1983 action is brought by Thomas Winsett, an inmate at the Delaware Correctional Center ("D. C. C."). Plaintiff complains that the defendant prison officials [1] have denied him classification to the work

1. Defendants' motion for a directed verdict as to Donald R. Davis and F. Earl McGinnes was granted at the close of plaintiff's presentation of his case. Transcript C-49-67.

release program at D. C. C. in violation of his rights to due process of law and equal protection under the Fourteenth Amendment. Plaintiff seeks compensatory and punitive damages, as well as a declaratory judgment and an injunction prohibiting further infringement.[2] This Opinion sets forth the Court's findings of fact and conclusions of law following a trial on the merits.

Winsett was sentenced in 1964 to a term of natural life after having been found guilty of the murder of State Police Officer Robert Paris. The killing caused a substantial public reaction in the State of Delaware, and is still the subject of deep resentment on the part of some citizens.

Winsett has applied for work release classification three times and on each occasion has been turned down. He claims that he met all established criteria for work release status and that each denial was motivated wholly, or at least in substantial part, by prison officials' fear of possible retaliation by the Delaware General Assembly (most likely in the form of budget, personnel or program cutbacks) and of adverse public reaction. Plaintiff maintains that such fears are impermissible reasons for denial of work release status.

Winsett's first turndown for work release classification was received by him on September 26, 1974. Winsett had applied for work release status, had been approved at the first level by the Minimum Security Building Classification Team, and had been approved at the second level by the Institution Classification Committee. At the third and final level of screening, however,—that of the Super-

2. This Court previously dismissed plaintiff's claim of entitlement to an injunction directing that he be classified to work release on the authority of *Preiser v. Rodriguez*, 411 U. S. 475, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973). *Winsett v. McGinnes*, 425 F. Supp. 609 (D. Del. 1976).

intendent (at this time defendant Raymond W. Anderson)—Winsett was informed that his application could not be approved "due to the sensitivity of [his] offense". (PX 1). The criteria and procedure for work release that were in effect at this time (DX 9) required final approval by the Superintendent. (Paragraph II l.c of DX 9).

During August, 1974, Winsett's case had been brought to the public's attention via copies of a letter to Superintendent Anderson delivered to the Delaware State News, News-Journal Papers and WAMS radio station, among others, in which a State senator announced his shock and dismay that Winsett might be considered for work release. Anderson responded by letter, sending copies to the same news media and others. In his letter Anderson denied any intention of placing Winsett on work release and stated his position as being "as long as I am Superintendent of the Institution, I shall never be able to entertain any requests from Tom [Winsett] in regards to work release. . . ." (PX 7 letter of August 8, 1974).

Winsett initiated the instant suit in October, 1974.

The second turndown for work release classification came on May 14, 1976, and the circumstances surrounding it are somewhat more complicated. At that time defendant Paul Keve was Acting Commissioner of the Delaware Department of Corrections and defendant Milton Horton was Assistant Director of the Adult Division. The criteria for work release status had changed by March of 1976, prompting Winsett to make a second application for work release classification. (Transcript A-31). The departmental policy then was that any classification for outside status (including work release classification) had to be approved by Acting Commissioner Keve, if the inmate in question had committed a crime of violence. (Transcript E-9). Horton, pursuant to Keve's request,

would make specific recommendations for approval or denial of outside status.

Winsett's application was approved at the first level by the Minimum Security Building Classification Team. The application was forwarded to the Institution Classification Committee. A rule had been adopted requiring a letter of employment to be filed with the application before it could be considered. Winsett had not met this requirement initially, but did obtain a letter of offer of employment (PX 11) and refiled his application. Once again the Minimum Security Building Classification Team approved his application, as did the Institution Classification Committee. Horton recommended, however, that Winsett's "application be deferred until [a] decision on [the] transfer." (DX 8). Keve agreed and the application was deferred, but formally recorded as a denial.

The transfer referred to by Horton in his recommendation to Keve was a project that had been developing for some months. Essentially, Keve had hoped to work out a contract with the Correction Department of the State of Minnesota wherein the interstate transfer of certain inmates could be accomplished. It was felt that this project would have been especially suitable for Winsett. As Keve testified:

> . . . [P]robably the best thing to do in the case of Mr. Winsett was to effect a transfer of him to some other state where the extreme sensitivity to this case would be substantially diluted. I felt that whatever time he might be considered truly appropriate for parole, work release, whatever it might be, that it would be much more feasible for it to be accomplished if he were in another state at some distance from Delaware where there was extreme public and legislative

> sensitivity to anything at all that happened in his case.

Testimony of Keve, Transcript E-12.

> . . . I had what I thought was good reason to believe that in addition to the natural hazard that any inmate faces in going into a work release situation, Mr. Winsett faced far more hazards because of the intense sensitivity to the case—intense public reaction and legislative reaction to anything done for or to Mr. Winsett that would smack of any kind of extra privileges.

Testimony of Keve, Transcript E-15.

Based on the record before me, I conclude that the first and second denials of Winsett's application for classification to work release were motivated at least in substantial part by prison officials' concern about a possible retaliation by the Delaware General Assembly. In the case of the second denial, I am convinced Acting Commissioner Keve believed that he had an alternative approach to work release which would better serve Winsett's interests.

The third and final denial for work release classification was received by Winsett on January 7, 1977. In late 1976, the General Assembly created another team that would approve work release classification applicants—the Institutional Release Classification Board. Winsett resubmitted his application for work release status. Again he was approved by the Minimum Security Building Classification Team, and the Institution Classification Committee, as well as the newly created Institutional Release Classification Board. His application was vetoed, however, by Milton Horton, Assistant Bureau Chief of Adult Correction. Horton advanced three reasons for his veto deci-

sion: (1) the seriousness of the offense, (2) the lack of a certified parole release date, which he believed was required by the existing guidelines,[3] and (3) the fact that Winsett had had a previous history of model conduct during incarceration in other institutions for other offenses occurring prior to the Paris murder and that, therefore, his good conduct during his present incarceration should be given less weight. This veto was approved by Commissioner Vaughn.

It is unnecessary to pass upon Horton's construction of the guidelines then in effect. I credit his testimony regarding the reasons for his actions and conclude that the third denial of Winsett's application for work release was not motivated by his concern with possible retaliation by the General Assembly or by a concern for public reaction.

Plaintiff makes two arguments: (1) that defendants' denial of his application for work release status deprived him of a liberty interest without due process of law, and (2) that such denials violated his equal protection rights. I deal first with the due process argument.

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3. Horton interpreted the guidelines (see PX 8, attachment at p. 1, paragraph II A) to require Winsett (who was sentenced to natural life and had no good time release date) to be certified for parole before he could be considered eligible for work release. He and several other witnesses testified that experience with work release programs has shown that inmates who have no near prospect of release are not good candidates for a situation involving continuous day-to-day contacts with free citizens. Whatever may be the merits of this view or Horton's construction of the work release guidelines of the Department of Corrections, they do not integrate well with the views of some members of the Board of Parole who have stated that they would like to see how Winsett would fare on work release before making an affirmative decision on parole. (PX 3, 4, 5). While this difference in approach between members of these two State agencies have understandably been frustrating to Winsett, I do not believe it gives rise to a federal question. Winsett has now been on furlough for some time and his experience on furlough will doubtless be made available to the Parole Board when it again reviews his case.

In order to invoke a due process claim, a party must first establish that he has been deprived of a liberty interest. *Morrissey v. Brewer*, 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); *Goldberg v. Kelly*, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). Plaintiff argues that "by instituting a work release program and by promulgating standards for its administration, the Department [of Corrections] has become bound by its decision and has created a vested state law right in the participation by eligible inmates in the work release program". Pl. Reply Br. p. 2.

I find this argument unpersuasive. Prior to August 5, 1976 the relevant Delaware statute regarding work release was 11 Del. C. § 6533(a) which provided:

> (a) The Department may adopt rules and regulations governing the employment or education of trustworthy inmates outside the institutions and facilities under the jurisdiction of the Department, except that whenever the Department requests placement of inmates in a school of a reorganized school district, the approval of the board of education of that district shall be a prerequisite to such placement, and tuition shall be paid under the terms of Chapter 6 of Title 14.

The 1976 amendment, among other changes, substituted "shall" for "may".

This statute permitted, and later required, the Department to create and maintain a work release program. I do not believe that the Courts of Delaware would construe it, however, as bestowing on any individual inmate a legally enforceable claim to work release status. Moreover, I reach the same conclusion with respect to rules adopted by the Department of Corrections pursuant to this

statutory authority. The rules in effect at the time of the initial turndown were entitled "Criteria and Procedure for Statewide Work Education Release". While they state general criteria of eligibility,[4] it is apparent that they were

4. I. *Basic Criteria, All Institutions:*
   1. Within one year of release or parole eligibility date.
   2. Demonstrated interest in personal improvement; progress toward increased maturity and self understanding. This will be evaluated on basis of inmate's work habits, program participation and general adjustment.

   II. *Basic Procedures:*
   1. Written application is submitted by inmate, following which it is considered by and must be approved successively by:
      a. Classification team
      b. Work/education release staff
      c. Superintendent

   III. *Variations:*
   1. Delaware Correctional Center
      a. Applicant must be assigned to Minimum Building before he can apply.
      b. Application is made to the Minimum Classification Team first, then to the Institutional Classification Team.
   2. Sussex Correctional Institution
      Classification Committee makes final decision.
   3. Women's Correctional Institution
      No variation from basic.

   IV. *Specific Criteria for Admission to Plummer Center:*
   1. Six months to parole eligibility or release.
   2. Sufficient experience in the work/education release program at the institution to have demonstrated a stable, dependable work and adjustment record.
   3. Family or personal history associated with Wilmington area.
   4. A score of at least 34 points on the scoring tool used by Plummer Center.
   5. Approval by the Director, the Superintendent of the institution, and the State Work Release Supervisor in the case of any inmate with a sex crime or crime of violence.

not intended to substitute an exclusive list of objective requirements for the discretion of the prison administration. They refer only to institutional adjustment, for example, and make no mention of other obviously relevant consideration such as the prognosis for behavioral adjustment, risk of flight, and the personal safety of the inmate after admission to work release. I mention these relevant factors not because I am persuaded that they should or did influence any decision in plaintiff's individual case, but rather for the purpose of demonstrating that the rules established only minimum guidelines for eligibility and did not deprive the work release program of its essentially discretionary character. Similar observation could be made about the other guidelines which have been in effect between September of 1974 and the present time.

The conclusion that the statute and rules gave Winsett no legally cognizable claim of entitlement to work release under Delaware law is dispositive of his claim that he has been denied due process of law. If a prisoner has no legally cognizable claim of entitlement, there is no liberty interest, the denial of which would bring the Due Process Clause into play. *Meachum v. Fano,* 427 U. S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976). As the Supreme Court observed in *Moody v. Daggett,* 429 U. S. 78, 97 S. Ct. 274, 50 L. Ed. 2d 236 (1976), in the context of federal incarceration:

> In *Meachum v. Fano* . . . , for example, no due process protections were required upon the discretionary

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4. (Cont'd.)

NOTE: Exceptions can be made to all of the above procedures. Exceptions must be approved by the Superintendent and Supervisor for Work/Education Release. If there is a conflict between these two, it is to be resolved by a committee of the Superintendent, State Supervisor for Work/Education Release, and Assistant Director for Community Services.

> transfer of state prisoners . . . . The same is true of prisoner classification and eligibility for rehabilitative programs in the federal system. Congress has given federal prison officials full discretion to control these conditions of confinement, 18 U. S. C. § 4081, and petitioner has no legitimate statutory or constitutional entitlement sufficient to invoke due process.

429 U. S. at 88, fn. 9, 97 S. Ct. at 279.

Both *Meachum* and *Daggett* involved procedural rather than substantive due process claims. But the Supreme Court's recent analysis in the substantive due process area suggests to this Court that a protected liberty interest must also be identified before substantive due process comes into play and that one's interest in being free of arbitrary state action is not, per se, a protected liberty interest. *Kelly v. Johnson,* 425 U. S. 238, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976). In *Meachum,* the court stressed the fact that a lawfully incarcerated prisoner has already been deprived of his liberty through due process of law and concluded that his interest in participation in less restrictive custody is not a protected liberty interest absent some state created claim of entitlement. The court's approach suggests to me that its view would be the same in the context of substantive as well as procedural due process. As the court observed in *Montanye v. Haymes,* 427 U. S. 236, 96 S. Ct. 2543, 49 L. Ed. 2d 466 (1976):

> . . . As long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him and are not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight. . . .

427 U. S. at 242, 96 S. Ct. at 2547.

Nor can I conclude that plaintiff is entitled to relief based on his equal protection claim. He has neither alleged nor proved any class based discrimination. He complains of individual decisions about his own conditions of confinement because they have been influenced by what he considers to be considerations unrelated to the purpose of the work release program.[5] Even if he were right, however, misapplications of State law do not constitute invidious discrimination which violates the Equal Protection Clause. As the Supreme Court observed in *Beck v. Washington*, 369 U. S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962) "were it otherwise, every alleged misapplication of State law would constitute a federal question". Accordingly, I conclude that plaintiff's equal protection claim is also without merit. *See Durso v. Rowe*, 430 F. Supp. 49 (N. D. Ill. 1977) which rejects an equal protection claim on substantially identical facts.

Judgment will be entered for the defendants.

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5. While plaintiff's argument is frequently cast in terms of "impermissible reasons" having played a part in the denial of work release, he does not, and could not on this record, maintain that they have come as a result of his exercise of a First Amendment or other constitutionally secured right or, as noted above, because of a suspect classification.

STATUTE INVOLVED.

§ 6531. Treatment programs; classification.

Persons committed to the institutional care of the Department shall be dealt with humanely, with effort directed to their rehabilitation, to effect their return to the community as safely and promptly as practicable. The Commissioner shall establish the following programs, and may establish others: Education, including vocational training; work; case work counselling and psychotherapy; library and religious services; commissary; and shall institute procedures for the study of classification of inmates for these purposes. Subject to the limitations of existing structures, rooms for the housing of inmates shall have adequate privacy, light and sanitary facilities, and personal needs, including facilities for visits by relatives and friends, shall be provided at a normal level.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

RECEIVED
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SUPREME COURT, U.S.

No. 79-2014

RAYMOND W. ANDERSON
and PAUL W. KEVE,

Petitioners,

v.

THOMAS H. WINSETT,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Thomas H. Winsett, who is in the custody of the Delaware Division of Adult Corrections and is now held in Kilby Correctional Facility near Montgomery, Alabama, asks leave to file the attached Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The respondent's affidavit in support of this motion is attached hereto.

ARLEN MEKLER

1700 Farmers Bank Building
Tenth and Market Streets
Wilmington, Delaware 19801

ATTORNEY FOR RESPONDENT

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-2014

RAYMOND W. ANDERSON
and PAUL W. KEVE,

Petitioners,

v.

THOMAS H. WINSETT,

Respondent.

AFFIDAVIT

I, Thomas H. Winsett, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis:

1. I am the respondent in the above-entitled case;
2. Because of my poverty I am unable to pay the costs of said cause;
3. I am unable to give security for the same;
4. I believe that I am entitled to the redress I seek in said case;
5. The nature of said cause if briefly stated as follows:

This case involves a due process challenge I brought against officials of the Delaware Department of Adult Corrections after they denied my application for work release. The Court of

Appeals for the Third Circuit found that I possessed a state-created liberty interest in participation in the work release program when I met all eligibility requirements under state law and held that the exercise of the prison authorities' discretion must be consistent with the work release policy.

Thomas H. Winsett

THOMAS H. WINSETT

Duly witnessed and sworn
to before me, a Notary
Public, this day
of , 1980.

NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

RECEIVED
JUL 24 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 79-2014

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v.

THOMAS H. WINSETT,

Respondent.

CERTIFICATE OF SERVICE

STATE OF DELAWARE)
)
NEW CASTLE COUNTY)

BE IT REMEMBERED, that on this 8th day of July, 1980, Arlen Mekler, a member of the Bar of The Supreme Court of the United States, and being duly sworn according to law deposes and says that he forwarded a copy of Petition for a Writ of Certiorari to John Parkins, Esquire, Department of Justice, 820 N. French Street, Wilmington, Delaware 19801, by United States mail with postage prepaid.

ARLEN MEKLER

SWORN TO AND SUBSCRIBED
before me this 8th day
of July, 1980.

Notary Public

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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RAYMOND W. ANDERSON and
PAUL W. KEVE,

Petitioners,

v.

THOMAS H. WINSETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ARLEN MEKLER, ESQUIRE
1700 Farmers Bank Building
Tenth and Market Streets
ATTORNEY FOR RESPONDENT

IN THE

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Thomas H. Winsett, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Third Circuit's opinion in this case. That opinion, not yet reported, is set out at pages A-3 through A-42 of the petition.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Decision of the Court of Appeals does not conflict with Decisions of this Court.

Petitioner contends that respondent Winsett has failed to show the existence of a liberty interest protected by the Fourteenth Amendment to the United States Constitution. Petitioner argues that the Court of Appeals ignored prior decisions of this Court and found that respondent had raised valid due process claim despite his alleged failure to meet this threshhold requirement. Petitioner misreads the decisions of this Court and the Court of Appeals' decision in this case.

As petitioner noted, this Court has repeatedly held that a mere unilateral expectancy is insufficient to give rise to a liberty interest protected by the Fourteenth Amendment. A person must have a legitimate claim of entitlement to establish the liberty interest that a prerequisite to invoking the Fourteenth Amendment's protection. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1973). Petitioner errs, however, in claiming that the Court of Appeals "made no finding that a specific statute or regulation conferred on (respondent) an entitlement to participate in the work release program." (Petition, p.7)

Petitioner is attempting to create a new requirement for obtaining relief: that a specific statute or regulation confers a particular right on an individual. This Court has never enunciated such a requirement. A liberty interest can arise as the result of official policies or practices. In Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978), cert. denied, 439 U.S. 1121 (1979), the Seventh Circuit held that a liberty interest exists where a prisoner proves the existence of a regular practice by prison officials that work release will not be revoked absent a prisoner's rule violation. Here, the Third Circuit found that the regulations governing work release in Delaware created a protectible liberty interest because the regulations indicated that the prison officials' discretion could "be exercised only within established parameters." (A22, citing Tracy v. Salomack, 572 F.2d 393 (2d Cir. 1978)).

No decision of this Court supports petitioner's argument. The Court of Appeals properly found the existence of a protectible liberty interest. This Court should deny the petition.

2. The Court of Appeals' reasoning and result have only limited application.

Petitioner argues that the Court of Appeals' ruling has broad application because of the prevalence of statutes similar to Delaware's work release statute, Del.C.Ann. tit. 11, §6531 (A55). In fact, the decision below has very limited application.

The opinion below manifests the peculiar facts upon which it rests. Respondent was convicted of a crime that aroused unusual public furor. Respondent's case is unique in its political sensitivity. It is difficult to imagine other litigants who can rival respondent's lengthy history of political oppression. The decision below turns upon its own facts and will affect few, if any, others than the litigants. It does not encourage federal courts to supervise day-to-day decisions of prison administrators. The Court of Appeals' ruling serves only to protect prisoners from particularly egregious conduct by prison officials that violates fundamental rights and constitutional protections that remain despite incarceration. See Wolf v. McDonnell, 418 U.S. 539 (1974).

CONCLUSION

For the foregoing reasons, this Court should decline to issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ARLEN MEKLER, ESQUIRE
1700 Farmers Bank Building
Tenth and Market Streets
Wilmington, Delaware 19801
ATTORNEY FOR RESPONDENT

6/30/80/REW

IN THE SUPREME COURT OF THE UNITED STATES

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